Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
The Petition of the State of Minnesota, Acting by and Through the Minnesota Department of Transportation and the Minnesota Department of Administration, for a Declaratory Ruling Regarding the Effect of Sections 253(a) (b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way	)	CC Docket No. 98-1

REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, herein replies to certain comments filed in response to the above-captioned Petition filed with the Commission by the State of Minnesota (the "State") on January 5, 1998.[1]

In the Petition, the State seeks a declaratory ruling from the Commission that it can proceed with the grant of an exclusive right to use freeway rights-of-way for installation of a

[1]FCC Public Notice, "Commission Seeks Comment On Minnesota Petition For Declaratory Ruling Concerning Access To Freeway Rights-Of-Way Under Section 253 Of The Telecommunications Act," CC Docket No. 98-1, 13 FCC Rcd 334 (rel. Jan. 9, 1998); FCC Public Notice, "Agreement Filed Related To Minnesota Petition For Declaratory Ruling Concerning Access To State Freeway Rights-Of-Way; Revision Of Previously Set Comment Dates," CC Docket No. 98-1, DA 98-236 (rel. Feb. 6, 1998).

statewide telecommunications network in light of the Telecommunications Act of 1996. The vast majority of the comments filed in this proceeding oppose the Petition and conclude that the State's proposal violates section 253(a) of the Communications Act of 1934, as amended (the "Act").[2] Time Warner appreciates the State's desire to upgrade its telecommunications infrastructure and to protect the safety of the traveling public and transportation workers; however, it concurs with those commenters and expresses the firm position that the Commission should not issue the requested declaratory ruling inasmuch as it would violate section 253(a).[3]

I. The Agreement

The State seeks a ruling declaring that its proposal to enter into an agreement granting, to a wholesale carrier of fiber optic transport capacity (the "Developer"), exclusive access to State freeway rights-of-way, subject to the dual obligations to (1) concurrently install and maintain fiber optic cable on behalf of any carriers on a competitively neutral and nondiscriminatory basis, and (2) make the capacity of its own system available to all telecommunications service providers on a competitively neutral and non-discriminatory basis (the "Agreement"), is consistent with section 253(a), (b) and (c).[4]

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[2]47 USC § 253(a).

[3]Time Warner, through various subsidiaries and affiliates, operates cable television systems across the nation. Another Time Warner affiliate, Time Warner Communications Holdings, Inc., provides telephone and other telecommunications and information services in various communities. As such, Time Warner is directly interested in the Petition as the declaratory ruling sought therein might affect both cable television and telecommunications operations.

[4]The Agreement specifies that the Developer will install at least 1,900 sheath miles of fiber (76,000 kilometers of fiber strand) of which 1,000 sheath miles are the subject of the exclusive access provisions of the Agreement. Petition at 12 and n.12 (citing Exhibit 5, Section 5.11).

According to the State, the Agreement is the necessary means to achieve its goals of (a) improving the State's telecommunications capabilities, (b) reducing the State's telecommunications costs (including the cost of developing intelligent transportation systems), (c) providing additional fiber optic telecommunications capability to rural areas, and (d) increasing competition for telecommunications services through the creation of additional wholesale transport capability, while protecting the safety and convenience of the traveling public and transportation workers.[5] While such goals represent good policy, Time Warner believes that the Agreement represents an unnecessary and unlawful method of implementation of those goals.

II. The Agreement Violates Section 253(a) Of The Act And Must Be Preempted.

The Agreement clearly represents an effort by the State to trade exclusive access to its freeway rights-of-way for the construction of a statewide fiber optic network. In this manner, the State reduces the economic cost of such a network. Thus, while cloaked in public policy, the Agreement is actually the result of the State's economic decisionmaking.. As discussed below, the Agreement must be preempted as an impairment of the ability of third parties to provide competitive telecommunications services in the State of Minnesota.

Section 253(a) of the Act provides:

> no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

The Commission has stated that it will consider whether the state action "materially inhibits or limits the ability of any competitor to compete in a fair and balanced legal and regulatory

[5]Petition at 2, 3.

environment."[6] If the Commission makes the requisite finding under section 253(a), it must preempt pursuant to section 253(d) which requires the Commission to preempt the enforcement of any state action that violates section 253(a).[7] The Agreement must be preempted because in granting to a single provider of telecommunications service exclusive access to state-owned rights-of-way along freeways throughout the State of Minnesota to construct, maintain and operate a statewide fiber optic telecommunications network, it materially impairs the ability of third parties to provide telecommunications services in competition with the Developer and fails to create a "fair and balanced legal and regulatory environment" hospitable to competition from third-party providers of telecommunications services.[8]

A. The Agreement Is Subject To Section 253(a) Preemption

The State contends that the Agreement pertains to telecommunications infrastructure, not telecommunications services, and is therefore outside the ambit of section 253(a).[9] This contention is misguided. The section 253(a) issue has nothing to do with the good intentions of the State to improve its telecommunications infrastructure but rather with the adverse effect of its action on the ability of entities to provide competitive telecommunications services. In this

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[6]In re California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, 12 FCC Rcd 14191, at ¶ 31 (1997); TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(c) and 253, FCC 97-331, at ¶ 98, (1997) ("TCI").

[7]47 USC § 253(d).

[8]See also e.g., Comments of MFS Network Technologies, Inc. ("MFS Comments") at 11-15; Comments of the Association for Local Telecommunications Services ("ALTS Comments") at 9-15; Opposition of Minnesota Telephone Association ("MTA Opposition") at 9-39.

[9]Petition at 4, 13-17.

regard, the State argues that the Developer is not a provider of telecommunications services and, therefore, section 253(a) is not applicable to the Agreement.[10] The State's analysis is plainly incorrect. Section 253(a) aims to protect providers of telecommunications services from barriers to competition. This requires an examination of whether, by granting exclusive access to the freeway rights-of-way to the Developer, the ability of third parties to provide any telecommunications services that they desire to provide is impaired. Thus, it is the status of these third parties, not the Developer, as providers of telecommunications services which looms important in this analysis.[11]

In any event, the Developer is indeed a provider of telecommunications services.[12] The efforts of the State to divorce the offer of network capacity from the definition of "telecommunications services" fail of their own weight. The Commission has explicitly stated that the phrase "telecommunications services" "covers all wholesale (as well as retail) telecommunications services.[13] In specifically rejecting a request that it exclude a "wholesale arrangement, carrier-to-carrier leasing of high-capacity private lines" from the definition of "telecommunications service," the Commission found "no basis in the statutory definition of

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[10]Petition at 4, 14.

[11]See also, e.g., Comments of MCI Telecommunications Corporations at 3-4; Comments of the National Cable Television Association ("NCTA Comments") at 4-6; MTA Opposition at 11-12.

[12]See also, e.g., ALTS Comments at 10; Comments of KMC Telecom, Inc. ("KMC Comments") at 3-4; MTA Opposition at 11, 14-19.

[13]In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, CC Docket No. 96-149, *Second Order On Reconsideration*, 12 FCC Rcd 8653, 8671 (1997).

'telecommunications services,' however, for concluding that this kind of wholesale arrangement, as opposed to all other kinds, falls outside that definition."[14] The Commission flatly rejected the proposition that "such wholesale private-line leasing arrangements should not be understood as the provisioning of services, but rather solely as the provisioning of facilities," stating that "such arrangements are plainly services."[15]

Moreover, the fact that the fiber optic network being constructed by the Developer is part of the State's telecommunications infrastructure does not alter the fact that the Developer will be providing wholesale transport capacity on a carrier-to-carrier basis in competition with other telecommunications carriers and, through unidentified affiliates, "may offer retail telecommunications services to the public and may utilize network transport capacity for this purpose."[16]

B. The Obligations Imposed On The Developer Do Not Save The Agreement From Preemption.

The exclusive nature of the Agreement is particularly troublesome because of its effect on the ability of third parties to provide competitive telecommunications services in the State of Minnesota. The State recognized the obvious problem with exclusivity and attempted a cure by imposing two obligations on the Developer. However, these obligations do not save the Agreement from preemption.[17]

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[14]Id.

[15]Id. at n.78.

[16]Petition at n.11.

[17]See also, e.g., KMC Telecom Comments at 5; Comments of NextLink Communications (continued...)

The first obligation - to concurrently install and maintain fiber optic cable on behalf of any carriers on a competitively neutral and nondiscriminatory basis - is inadequate because of the dilutive effect of the word "concurrently." The obligation limits the ability of third parties to have their fiber installed to the times when the Developer, in its discretion, determines that it will install its own fiber. This leaves the timing of the installation of third party fiber up to a competitor. Moreover, the Developer is required to maintain and operate the fiber owned by third parties with whom it competes.[18] Thus, the ability of these third parties to provide telecommunications services is impaired not only because a competing provider of telecommunications services controls their access to rights-of-ways but also the maintenance and operation of their fiber after it is installed. This problem is exacerbated by the duration of the exclusive right of access held by the developer, which is effectively 20 years from completion of the project.[19]

The second obligation imposed on the Developer - that it make the capacity of its own system available to all telecommunications service providers on a competitively neutral and nondiscriminatory basis - only serves to substitute the resale of the Developer's capacity for a facilities-based competitor. The Commission has made clear that "Section 253(a) of the Act bars

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[17](...continued)
("Network Comments") at 8-9; Comments of US West ("US West Comments") at 13-15; ALTS Comments at 12; NCTA Comments at 10-11; Comments Of GTE Service Corporation ("GTE Comments") at 6-9.

[18]Petition at 11. See also, e.g., NextLink Comments at 9.

[19]This is because, in addition to the ten-year term of the exclusivity, the developer has "a right of first negotiation" for an additional ten years. Petition at 11. See also, e.g., MTA Opposition at 25-26.

state or local governments from restricting the means by which a new entrant chooses to provide telecommunications."[20] Thus, the State cannot find refuge in offering resale to third parties as a means of making up for having so impaired their ability to provide facilities-based competition in the provision of telecommunications services.

C. The State's Emphasis On The Amount Of Telecommunications Service Competition Or The Amount Of Fiber In Minnesota Is Misplaced In A Section 253(a) Analysis.

The State attempts to turn the purpose and wording of section 253(a) on their head by claiming that there is sufficient competition and fiber in the State of Minnesota to withstand the grant of exclusive access and control of the State's freeway rights-of-way to a single telecommunications service provider. In discussing the "relevant market" and the "current level of competition in this market," the State misconstrues the significance of section 253.[21] The level of competition, the quality of the competition or the number of competitors in the market is not relevant.[22] Congress did not limit section 253 to situations lacking a certain level of competition. Section 253 is aimed, in relevant part, at any local statute or regulation or other State or local legal requirement that may have the effect of prohibiting the ability of **any** entity to provide any

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[20]In re The Public Utility Commission of Texas, CCB Pol 96-13, FCC 97-346, at ¶ 128 (released Oct. 1, 1997). See also, e.g., Comments of Teleport Communications Group, Inc. ("Teleport Comments") at 8-13.

[21]Petition at 19, 20-25.

[22]See also, e.g., ALTS Comments at 13-14; NCTA Comments at 9.

interstate or intrastate telecommunications service. That is, the protection provided by section 253 is not limited to classes or types of entities or levels of competition.[23]

Moreover, the State's efforts to focus the Commission's attention on the existence of other rights-of-ways "along railroads, gas pipelines, oil pipelines and electric power lines, as well as state and county roads" is merely diversionary.[24] These other rights-of-way are not fungible with the 1,000 sheath miles of the freeway rights-of-way that are the subject of the Agreement. Aside from having different geographic locations, the other rights-of-way that are controlled by utilities are under no legal requirement to allow telecommunications service providers to access their rights-of-way.[25] Finally, the Developer, as the favored provider, only needs to execute the (single) Agreement in order to get access to the freeway rights-of-way. This is a tremendous competitive benefit since all other providers must enter into multiple contracts with multiple

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[23]In attempting to explain "what this case is not about," the State attributes significance to the fact that the subject rights-of-way have never been previously utilized for longitudinal utility placements and thus adds to rather than subtracts from the inventory of rights-of-way available in the state. Petition at 19. However, the action complained of does not concern whether the subject rights-of-way are new or old but, rather, whether the conditions that attach to their availability materially impair the ability of third parties to provide any telecommunications service they choose to provide in competition with the Developer. Similarly, the State of Minnesota points out that "this is not a case in which State contracting authority has been utilized with the purpose of conditioning or restricting competition." Id. However, as noted before, it is the **effect** of the state action, not the **purpose** of the state action, that is problematic in the case of section 253(a). See also, e.g., ALTS Comments at 16; GTE Comments at 9-10.

[24]Petition at 23. See also e.g., ALTS Comments at 14-15. Similarly, the amount of fiber in the State of Minnesota is a useless statistic since the placement and use of such fiber varies widely and the State has made no showing of substitutability with respect to the fiber which is the subject of the exclusive access provisions of the Agreement.

[25]One exception is the limited requirement imposed on electric utilities to allow carriers to use their rights-of-way.

entities in order to obtain access to other rights-of-way for equivalent end-to-end routing, at significantly higher costs.

III. The Agreement Is Not Saved By Section 253(b) Or (c).

The State contends that even if the Commission finds that section 253(a) requires preemption of the Agreement, it is saved from preemption as permissible management of its rights-of-way pursuant to section 253(b) and (c).[26] As discussed below, the "safe harbor" provisions of those two subsections provide no refuge in this case.

The State adopts an incorrect view of the concept of "competitively neutral" as embodied in section 253(b). It alleges that it has "satisfied the competitive neutrality test by engaging in an open and fair Request for Proposals process and awarding the contract to the most advantageous proposer."[27] The State of Minnesota is incorrectly applying the section 253(b) "competitive neutrality" test to a government contract procurement process. The section 253 challenge to the

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[26]Section 253(b) and (c) state as follows:

> (b) Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 USC § 253(b) and (c).

[27]Id. at 28.

Agreement has nothing to do with the fairness of the procurement process. It is not whether the process used by the State of Minnesota to select a single entity was competitively neutral but whether the use of a single entity competitor imbued with control over when competitors can install their own fiber facilities and over the maintenance and operation of such installed fiber is "competitively neutral" within the meaning of section 253(b).[28] Time Warner submits that the State's exclusive access provisions are not competitively neutral and thus do not come within the safe harbor provisions of section 253(b).[29]

The State also takes an impermissibly broad view of what are "requirements necessary to . . . protect the public safety and welfare."[30] First, the Agreement must be viewed for what it is, an economically-driven decision by the State to defray the costs of constructing a fiber optic telecommunications network by awarding exclusive access to its freeway rights-of-way in exchange for the construction of the network. Thus, the Agreement does not have its genesis in an exercise of the State's exercise of its police powers to protect the public safety and welfare.

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[28]The State points to the Commission's decision in In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, Third Report and Order and Second Order on Reconsideration, FCC 96-334, at ¶ 195, (rel. August 8, 1996) ("Open Video Systems"), for the proposition "that the competitively neutral standard of section 253(b) does not mean 'equal treatment.'" Petition at 28. Aside from the fact that the Open Video Systems decision did not involve section 253(b), the issue here is not whether "equal treatment" is required but whether the preferential treatment accorded the Developer is "competitively neutral." Clearly, it is not.

[29]See also, e.g., US West Comments at 17-20; Comments of National Telephone Cooperative Association ("NTCA Comments") at 4-6; Teleport Comments at 18-19; MFS Comments at 23-25; NCTA Comments at 13; GTE Comments at 10-11; MTA Opposition at 50-51.

[30]Petition at 27-28. See also, e.g., US West Comments at 17-20; NTCA Comments at 4; Teleport Comments at 18-19; ALTS Comments at 16; MFS Comments at 20-23; NCTA Comments at 12-13; MTA Opposition at 43-50.

As such, the exclusivity and control provisions of the Agreement operate as "a third tier of telecommunications regulation" such as those which have been a subject of the Commission's serious concern.[31] Second, the State's contention that the exclusivity and control provisions of the Agreement are necessary to protect the traveling public and transportation workers is undermined by the fact that the Agreement itself requires the Developer to construct almost as many sheath miles on State Trunk Highway rights-of-way without awarding the Developer the same exclusivity and control as in the case of the freeway rights-of-way.

Finally, the exclusivity and control provisions of the Agreement go far beyond a State's right to manage access to its rights-of-ways pursuant to section 253(c) which have been acknowledged by the Commission to include such matters as the "coordination of construction schedules, determination of insurance, bonding and indemnity agreements, establishment and enforcement of building codes, and keeping track of the various systems using rights-of-way to prevent interference between them."[32] Clearly, the award of exclusive access to state-owned freeway rights-of-way containing 1,000 sheath miles of fiber to a single telecommunications service provider does not fall within the accepted methods of rights-of-way management.[33] Given the impairment of the ability of third parties to provide competitive telecommunications services, the exclusivity and control provisions of the Agreement can hardly be justified on the basis of a State's right to manage its rights-of-way.

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[31]See TCI at ¶ 105; Classic Telephone, Inc., Petition for Emergency Relief, Sanctions and Investigation, 12 FCC Rcd 15619, 15636 (1997) ("Classic Telephone").

[32]TCI at ¶ 103; Classic Telephone at n. 102.

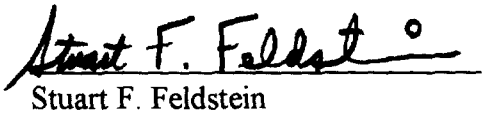
[33]See also e.g., MTA Opposition at 52-54; NCTA Comments at 13-14; MFS Comments at 35-38; US West Comments at 20-24.

Conclusion

In view of the foregoing, Time Warner submits that the Petition should be denied because the Agreement violates Section 253(a) and the Commission must therefore preempt the Agreement pursuant to Section 253(d).

Respectfully submitted,

TIME WARNER CABLE



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April 9, 1998

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CERTIFICATE OF SERVICE

I, Robert S. Childress, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "Reply Comments Of Time Warner Cable" was served this 9th day of April, 1998, via first class mail, postage prepaid, upon the following:

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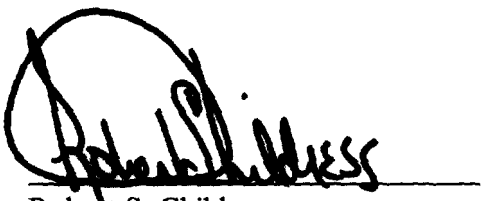

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